Tony Pua Kiam Wee v Dato' Sri Mohd Najib bin Tun Hj Abdul Razak & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21NCVC-5–01 OF 2017
FAIZAH JAMALUDIN JC
13 OCTOBER 2017

Civil Procedure — Striking out — Writ and statement of claim — Plaintiff brought action against first defendant for tort of misfeasance in public office — Defendants filed application to strike out plaintiff's writ and statement of claim under O 18 r 19(1) and O 92 r 4 of the Rules of Court 2012 — Whether plaintiff had antecedent legal rights or interests to bring action — Whether first defendant public officer — First defendant's state of mind when he committed alleged acts — Whether first defendant's acts caused loss and damages claimed by plaintiff — Whether damages recoverable

Tort — Misfeasance in public office — Ingredients of — Plaintiff brought action against first defendant for tort of misfeasance in public office — Defendants filed application to strike out plaintiff's writ and statement of claim under O 18 r 19(1) and O 92 r 4 of the Rules of Court 2012 — Whether plaintiff had antecedent legal rights or interests to bring action — Whether first defendant public officer — First defendant's state of mind when he committed alleged acts — Whether first defendant's acts caused loss and damages claimed by plaintiff — Whether damages recoverable

The first defendant was the Member of Parliament for the parliamentary constituency of Pekan, the Prime Minister of Malaysia, the Finance Minister of Malaysia and the Chairman of Board of Advisors of 1Malaysia Development Bhd ('1MDB'), whereas the second defendant was the government of Malaysia. The plaintiff had brought an action against the defendants in his personal capacity as a Malaysian taxpayer. The plaintiff's claim was based on the tort of misfeasance in public office. The plaintiff claimed that he had suffered loss of reputation as a result of the first defendant's alleged misfeasance in public office in relation to 1MDB ('the 1MDB related actions'). As against the second defendant, the plaintiff's claim was pursuant to the Government Proceedings Act 1958. In response, the first defendant filed an application to strike out the plaintiff's writ of summons and statement of claim pursuant to O 18 r 19(1)(a) or (1)(b), (1)(c) and (1)(d) of the Rules of Court 2012 ('the ROC') and/or the court's inherent jurisdiction; and the second defendant filed an application to strike out the plaintiff's writ and statement of claim under O 18 r 19(1)(a) or (1)(b) or (1)(d) of the ROC and/or under O 92 r 4 of the ROC.

The issues for court's consideration were: (a) whether the plaintiff had antecedent legal rights or interests to bring the action; (b) whether the first defendant was a public officer; (c) what was the first defendant's state of mind when he committed the alleged acts; and (d) whether the first defendant's acts had caused the loss and damages claimed by the plaintiff and whether the damages recoverable.

Held, allowing the defendants' claims and striking out the plaintiff's action against the defendants with costs of RM5,000 each to the first and second defendants subject to allocator:

(1) Based on the fundamental legal principle that a company was a separate entity distinct from the shareholders, the Ministry of Finance as shareholder of 1MDB did not have any legal or equitable interest to property owned by 1MDB. It followed that, a taxpayer by virtue of being a taxpayer would also not have any legal rights or interests to the properties of 1MDB and as such, the plaintiff's claim that he suffered loss of reputation because his taxpayers' monies had been used to incorporate 1MDB did not give him any legal rights or interests to entitle him to a declaration against the first defendant under the Specific Relief Act 1950 (see paras 48–49 & 51).

(2) The plaintiff did not provide any relevant and material particulars in the statement of claim to show that the first defendant when he committed the alleged 1MDB related actions not only knew that he acted beyond his powers but also that he knew he was reckless that his act would cause the significant devaluation of Ringgit Malaysia, that a travel ban would be imposed on the plaintiff and these would cause the plaintiff to lose reputation. Moreover, the plaintiff could not base his claim for loss of reputation on the tort of misfeasance in public office. Such a claim for loss of reputation had to be pursued in an action for defamation. For the above reasons, the plaintiff had not prima facie established that he had antecedent legal rights or interests to bring an action against the defendants for loss of reputation (see paras 53 & 55–56).

(3) The Court of Appeal upheld the High Court's decision in the case of *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2017] 9 MLJ 1 that a Prime Minister of Malaysia was not a public officer. Accordingly, pursuant to the principle of stare decisis, the present court was bound by the Court of Appeal's decision that the first defendant in his capacity as Prime Minister was not a public officer. Similarly, as a Finance Minister, the first defendant was not a public officer. The office of the Prime Minister and Ministers were expressly excluded from the definition of public service. Further, 1MDB was a limited company and companies did not come within the definition of public office under the Interpretation Acts 1948 and 1967 ('the IA'). In

addition, neither the Senate nor the House of Representatives came within the definition of public office or public services under the IA. Based on the above findings, the first defendant was not a public officer pursuant to his capacity as the Prime Minister, the Minister of Finance, the Chairman of the Board of Advisors of 1MDB or as a Member of Parliament (see paras 60–62 & 64–65).

(4) No particulars relating to the first defendant's state of mind were pleaded in the statement of claim. Without such particulars, the court was not persuaded that the plaintiff could establish on a balance of probabilities that the first defendant when he allegedly committed the 1MDB related actions knew that the actions were in excess of his powers and he knew that the actions would probably cause the loss of reputation claimed by the plaintiff or he was reckless as to the consequence of his actions (see para 70).

(5) The relevant test for determining whether the loss suffered by the plaintiff was recoverable was the test of knowledge, namely that the first defendant knew that his decision to commit the 1MDB related actions would probably cause the loss of reputation claimed by the plaintiff. Without providing any particulars on the state of the first defendant's mind at the time of committing the 1MDB related actions, the plaintiff would not be able to satisfy the test of knowledge. Accordingly, the plaintiff was not able to demonstrate based on his pleadings the rest of the essential elements of the tort of misfeasance in public office, namely that the first defendant's actions caused the plaintiff's loss of reputation and that the loss suffered was recoverable (see paras 71–73).

(6) In totality, the plaintiff had not been able to establish any of the ingredients required to found a prima facie case of tort of misfeasance in public office against the first defendant. The plaintiff's failure to establish these necessary ingredients rendered his cause of action for the tort of misfeasance in public office against the first defendant obviously unsustainable (see para 78).

[Bahasa Malaysia summary

Defendan pertama adalah ahli Parlimen bagi kawasan Parlimen Pekan, Perdana Menteri Malaysia, Menteri Kewangan Malaysia dan Pengerusi Lembaga Penasihat 1Malaysia Development ('1MDB') manakala defendan kedua ialah Kerajaan Malaysia. Plaintif memulakan tindakan terhadap defendan-defendan dalam kapasiti peribadi beliau sebagai pembayar cukai Malaysia. Tuntutan plaintif adalah berdasarkan tort misfeasans dalam jawatan awam. Plaintif mendakwa kehilangan reputasi akibat dakwaan misfeasans dalam jawatan awam berkenaan 1MDB ('tindakan berkaitan 1MDB'). Terhadap defendan kedua, tuntutan plaintif adalah menurut Akta Prosiding Kerajaan 1958. Sebagai balasan, defendan pertama memfailkan permohonan membatalkan

writ saman dan penyata tuntutan plaintif di bawah A 18 k 19(1)(a) atau (1)(b), (1)(c) dan (1)(d) Kaedah-kaedah Mahkamah 2012 ('KKM') dan atau bidang kuasa inheren mahkamah; dan defendan kedua memfailkan permohonan membatalkan writ dan penyata tuntutan plaintif di bawah A 18 k 19(1)(a) atau (1)(b) atau (d) KKM dan/atau di bawah di A 92 k 4 KKM. Isu-isu bagi pertimbangan mahkamah adalah: (a) sama ada plaintif mempunyai hak undang-undang atau kepentingan terdahulu untuk memulakan tindakan; (b) sama ada defendan pertama adalah penjawat awam; (c) apakah keadaan minda defendan pertama ketika beliau melakukan tindakan-tindakan yang didakwa; dan (d) sama ada tindakan defendan pertama menyebabkan kehilangan dan kerugian seperti yang dituntut oleh plaintif dan sama ada ganti rugi boleh diperoleh.

Diputuskan, membenarkan tuntutan-tuntutan defendan-defendan dan membatalkan tindakan plaintif terhadap defendan-defendan dengan kos RM5,000 setiap seorang buat defendan pertama dan kedua tertakluk pada alokatur:

(1) Berdasarkan prinsip asas undang-undang bahawa syarikat adalah entiti asing daripada pemegang saham, Menteri Kewangan sebagai pemegang saham 1MDB tidak mempunyai kepentingan undang-undang atau berekuiti dalam hartanah milik 1MDB. Ini diikuti bahawa, pembayar cukai, kerana membayar cukai, juga tidak ada apa-apa hak atau kepetingan undang-undang terhadap hartanah-hartanah 1MDB dan dengan itu, tuntutan plaintif bahawa dia kehilangan reputasi kerana wang pembayar cukai telah digunakan untuk menubuhkan 1MDB tidak memberikan dia apa-apa hak atau kepentingan undang-undang untuk melayakkannya membuat pengisytiharan terhadap defendan pertama bawah Akta Relief Spesifik 1950 (lihat perenggan 48–49 & 51).

(2) Plaintif tidak mengemukakan apa-apa butiran relevan dan material dalam penyata tuntutan tersebut untuk menunjukkan bahawa defendan pertama, semasa melakukan tindakan berkaitan 1MDB yang didakwa, bukan sahaja tahu beliau bertindak melampaui kuasa tetapi juga beliau tahu beliau cuai dalam tindakan beliau hingga menyebabkan penurunan nilai Ringgit Malaysia, bahawa larangan perjalanan akan dikenakan pada plaintif dan ini akan menyebabkan plaintif kehilangan reputasi. Tambahan lagi, plaintif tidak boleh mengasaskan tuntutannya bagi kehilangan reputasi berdasarkan tort misfeasans dalam jawatan awam. Tuntutan bagi kehilangan reputasi sedemikian perlu dimulakan dalam tindakan bagi fitnah. Bagi alasan-alasan ini, plaintif tiada prima facie untuk membuktikan dia mempunyai hak-hak atau kepentingan-kepentingan undang-undang untuk memulakan tindakan terhadap defendan-defendan bagi kehilangan reputasi (lihat perenggan 53 & 55–56).

(3) Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi dalam kes *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2017] 9 MLJ 1 bahawa seorang Perdana Menteri Malaysia bukan penjawat awam. Oleh itu, di bawah prinsip stare decisis, mahkamah ini terikat dengan keputusan Mahkamah Rayuan bahawa defendan pertama dalam kapasiti beliau sebagai Perdana Menteri bukan penjawat awam. Begitu juga, sebagai Menteri Kewangan, defendan pertama bukan penjawat awam. Jawatan Perdana Menteri dan Menteri-menteri jelas terkecuali daripada definisi jawatan awam. Selanjutnya, 1MDB adalah syarikat berhad dan syarikat-syarikat tidak tergolong dalam definisi jawatan awam di bawah Akta Tafsiran 1948 dan 1967 ('AT'). Tambahan lagi, Dewan Negara mahupun Dewan Negeri tidak tergolong di bawah definisi jawatan awam atau perkhidmatan awam di bawah AT. Berdasarkan dapatan-dapatan ini, defendan pertama bukan penjawat awam berikutan kapasiti beliau sebagai Perdana Menteri, Menteri Kewangan, Pengerusi Lembaga Penasihat 1MDB atau sebagai ahli Parlimen (lihat perenggan 60–62 & 64–65).

(4) Tiada butiran tentang keadaan minda defendan pertama yang diplidkan dalam penyata tuntutan. Tanpa butiran sedemikian, mahkamah tidak yakin bahawa plaintif boleh membuktikan atas imbangan kebarangkalian bahawa defendan pertama, semasa beliau melakukan tindakan berkaitan 1MDB yang didakwa, tahu bahawa tindakan-tindakan ini melampaui kuasa-kuasa beliau dan beliau tahu tindakan-tindakan tersebut mungkin akan menyebabkan kehilangan reputasi seperti yang dituntut oleh plaintif atau bahawa beliau gagal akibat tindakan-tindakan beliau (lihat perenggan 70).

(5) Ujian relevan untuk menentukan sama ada kehilangan yang dialami oleh plaintif boleh diperoleh semula adalah ujian pengetahuan, khususnya bahawa defendan pertama tahu bahawa keputusan beliau untuk melakukan tindakan-tindakan berkaitan 1MDB mungkin akan menyebabkan kehilangan reputasi seperti yang didakwa oleh plaintif. Tanpa memperuntukkan apa-apa butiran tentang keadaan minda defendan pertama semasa melakukan tindakan-tindakan berkaitan 1MDB tersebut, plaintif tidak dapat memenuhi ujian pengetahuan. Oleh itu, plaintif tidak dapat menunjukkan, berdasarkan pliding beliau, elemen-elemen penting tort misfeasans dalam jawatan awam yang selebihnya, khususnya tindakan-tindakan defendan pertama yang menyebabkan kehilangan reputasi plaintif dan bahawa kerugian yang dialami boleh diperoleh (lihat perenggan 71–73).

(6) Secara keseluruhannya, plaintif tidak dapat membuktikan apa-apa inti pati yang diperlukan untuk membuktikan kes prima facie *tort misfeasans* dalam jawatan awam terhadap defendan pertama. Kegagalan plaintif untuk membuktikan kesemua inti pati penting ini menjadikan kausa

tindakannya bagi tort misfeasans dalam jawatan awam terhadap defendan pertama jelas tidak boleh dikekalkan (lihat perenggan 78).]

Notes

For cases on misfeasance in public office in general, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1079–1083.

For cases on writ and statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9563–9581.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 2 AMR 1969; [1993] 4 CLJ 7, SC (refd)

CC Ng & Brothers Sdn Bhd v Government of State of Pahang [1985] 1 MLJ 347; [1985] 1 CLJ 235; [1985] CLJ Rep 45, FC (refd)

Dato' Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail & Ors [2015] 7 MLJ 763; [2014] 9 CLJ 489, HC (refd)

Davis v Bromley Corpn [1908] 1 KB 170, CA (refd)

Dunlop v Woollahra Municipal Council [1981] 1 All ER 1202; [1982] AC 158, PC (refd)

Foaminol Laboratories Ltd v British Artid Plastics Ltd [1941] 2 All ER 393, KBD (refd)

Garrett v Attorney-General [1997] 2 NZLR 332, CA (refd)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12; [1988] 1 CLJ Rep 63, SC (refd)

Keruntum Sdn Bhd v The Director of Forests & Ors [2017] 3 MLJ 281; [2017] 4 CLJ 676, FC (refd)

Law Kam Loy and Anor v Boltex Sdn Bhd and Others [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)

Lawrance v Lord Norreys (1890) 15 App Cas 210, HL (refd)

Letang v Cooper [1965] 1 QB 232, CA (refd)

Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors) [2004] 3 MLJ 301, CA (refd)

Northern Territory of Australia and others v Arthur John Mengel and others (1995) 185 CLR 307, HC (refd)

Rawlinson v Rice [1997] 2 NZLR 651, CA (refd)

Riga Sdn Bhd v Haji Awang Sepian Haji Awang Joini & Ors [2005] MLJU 668; [2005] 1 LNS 251, HC (refd)

Salomon v A Salomon & Co Ltd [1897] AC 22, HL (refd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 1 CLJ 1, FC (refd)

Spring v Guardian Assurance plc and others [1994] 3 All ER 129, HL (refd)

Three Rivers District Council and others v Bank of England [2000] 3 All ER 1, HL (refd)

Three Rivers District Council and others v Bank of England (No 3) [1996] 3 All ER 558, QBD (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1; [1975] 1 LNS 133, PC (refd)
Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak [2017] 9 MLJ 1; [2017] 3 AMR 911, HC (refd)
Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Haji Abdul Razak [2017] MLJU 1941, CA (refd)
Turner v Sterling (1671) 2 Vent 24; 86 ER 287 (refd)

Legislation referred to

Companies Act 1965
Federal Constitution arts 132(1), (3), 133, 160(2)
Government Proceedings Act 1958
Interpretation Acts 1948 and 1967 s 3
Rules of Court 2012 O 18 r 19(1), (1)(a), (1)(b), (1)(c), (1)(d), O 92 r 4
Specific Relief Act 1950 s 41

Gobind Singh Deo (Joanne Chua and Michelle Ng with him) (Gobind Singh Deo & Co) for the plaintiff.
Cecil Abraham (Mohd Hafarizam Harun, Rishwant Singh and Nik Nuraisha Alia Hanafi with him) (Hafarizam Wan & Aisha Mubarak) for the first defendant.
Alice Loke Yee Ching (Senior Federal Counsel, Attorney General's Chambers) for the second defendant.

Faizah Jamaludin JC:

INTRODUCTION

Application

[1] These are my grounds of judgment in respect of the first and second defendants applications to strike out the plaintiff's writ of summons and statement of claim.

[2] The first defendant's application is made under O 18 r 19(1)(a) or (1)(b), (1)(c) and (1)(d) of the Rules of Court 2012 ('the ROC') and/or under this court's inherent jurisdiction (in encl 9 and amended in encl 26). The second defendant's application is made under O 18 r 19(1)(a) or (1)(b), or (1)(d) of the ROC and/or under O 92 r 4 of the ROC (in encl 13).

Parties

[3] The plaintiff is the Member of Parliament for parliamentary constituency of Petaling Jaya Utara since 2008. The plaintiff brought this suit against the defendants in his personal capacity and as a Malaysian taxpayer.

[4] The first defendant ('D1') is the Member of Parliament for parliamentary constituency of Pekan since 1976. D1 is presently and at all material times President of the political party United Malays National Organisation ('UMNO'), Chairman of Barisan Nasional, Prime Minister of Malaysia, Finance Minister of Malaysia; and Chairman of Board of Advisors of 1Malaysia Development Bhd ('1MDB'), a limited liability company incorporated under the Companies Act 1965.

[5] The second defendant ('D2') is the government of Malaysia.

The plaintiff's claim against defendants

Claim against D1

[6] The plaintiff's suit against D1 is grounded on the tort of misfeasance in public office. The plaintiff claims, in essence, that he has suffered loss of reputation as a result of D1's alleged misfeasance in public office in relation to various investment transactions and agreements entered by 1MDB; guarantees, undertakings and/or assurances given by the Government of Malaysia for 1MDB bonds; and unlawful dissipation and/or misappropriation of 1MDB's funds ('1MDB related actions').

Particulars of D1's misfeasance in public office

[7] Particulars of D1's alleged misfeasance in public office pleaded in the statement of claim are as below:

PARTICULARS OF MISFEASANCE

158.1 Najib Razak is public official by virtue of his capacity stated in paragraph 2 above.

158.2 As the Prime Minister and/or Minister of Finance and/or Chairman of 1MDB's Board of Advisors, Najib Razak:

a. has and/or had a direct and/or indirect role in the decisions and/or directions of 1MDB;

b. has and/or had the authority to approve all appointments to, and removals from, 1MDB's BOD (Board of Directors) and 1MDB's Senior Management Team;

c. has and/or would have given his approval in relation to 1MDB transactions set out in the paragraphs above; and

d. is empowered by Article 117 of 1MDB's M & A (Memorandum and Articles of Association) which states that:

> For the avoidance of doubt and notwithstanding anything in the Articles, none of the following shall take effect without the prior written approval of the Prime Minister:
>
> [...]
>
> (c) any financial commitment (including investment), restructuring or any other matter which is likely to affect the guarantee given by the Federal Government of Malaysia for the benefit of (1MDB), the national interest, national security or any policy of the Federal Government of Malaysia ...

158.3 Najib Razak in his capacity as stated above had knowingly and/or recklessly used his influence and position to, inter alia, procure guarantees, undertakings and/or assurances from the Government of Malaysia for 1MDB bonds, from which proceeds were transferred to his personal bank accounts.

158.4 Najib Razak maliciously, knowingly and/or recklessly approved 1MDB and/or its associated companies to enter into various investment transactions and agreements as stated above without conducting due diligence which resulted in the unlawful and surreptitious dissipation and/or misappropriation of 1MDB funds.

158.5 Najib Razak maliciously, knowingly and/or recklessly facilitated and/or allowed sham agreements to take place in order to create falsified circuitous trails to conceal the unlawful of misappropriations of 1MDB funds.

158.6 Najib Razak maliciously, knowingly and/or recklessly allowed and/or advised and/or facilitated and/or caused the unlawful and surreptitious dissipation and/or misappropriation of 1MDB funds for improper purposes and/or contrary to purpose and intent of 1MDB's incorporation, including to unlawfully enrich himself and his associates, including without limitation to, Riza Aziz and Jho Low;

158.7 Najib Razak maliciously and/or knowingly and/or recklessly provided wrong and/or misleading replies to queries posed to him in Parliament in order to conceal the true facts of the various 1MDB transactions;

158.8 Najib Razak had knowledge that his conduct as referred to in the paragraphs above will lead to loss, harm and damage to all Malaysian citizens, including the plaintiff.

158.9 Najib Razak had unlawfully received the sum of about USD731,000,000.00 and/or any amount directly or indirectly from 1MDB funds of which a portion the plaintiff is a rightful beneficiary to.

Claim against D2

[8] The plaintiff's claim against D2 is pursuant to the Government Proceedings Act 1958. The plaintiff pleads that:

> 160. The Government of Malaysia is vicariously liable for the matters aforesaid by virtue of Najib Razak's capacity as a government servant and his acts done in his public capacity.

Particulars of the plaintiff's loss and damage

[9] The plaintiff pleads that D1's misfeasance in public office has caused him to suffer a loss of reputation because:

(a) his tax monies had been utilised for the incorporation of 1MDB, which were dissipated and/or misappropriated;

(b) his tax monies will be used in the future to clear the guarantees given by the Government of Malaysia;

(c) a travel ban imposed on him as a result of his public statements in relation to 1MDB matters; and

(d) the loss in value of his wealth as a result of the significant devaluation of the Malaysian Ringgit caused by D1's conduct.

[10] Particulars of the plaintiff's loss and damage pleaded in the statement of claim are as below:

PARTICULARS OF LOSS AND DAMAGE

159.1 The plaintiff is a Malaysian taxpayer. The plaintiff's tax monies had been directly and/or indirectly utilized for the incorporation of 1MDB, which were dissipated and/or misappropriated in the manner set out in the paragraphs above. Further, the plaintiff's tax monies will in the future be used to clear various guarantees and assurances by the Government of Malaysia.

159.2 The plaintiff had issued public statements in relation to matters relating to 1MDB that were considered to be allegedly defamatory and/or critical of Najib Razak and/or detrimental to parliamentary democracy, which ultimately led to an imposition of a travel ban on the plaintiff.

159.3 The conduct of Najib Razak as stated above had directly and/or indirectly caused a significant devaluation of the Malaysian Ringgit, resulting in a loss in the value of the plaintiff's wealth.

159.4 By virtue of the matters aforesaid, the plaintiff had suffered reputational loss.

Reliefs sought by the plaintiff from the defendants

[11] The plaintiff is seeking for declarations that the: (i) the defendant has committed misfeasance in public office; and (ii) he had abused his public office in personally benefitting and/or profiting from his receipt of the IMDB funds. The plaintiff is also seeking general, aggravated and exemplary damages against the defendants.

[12] The declarations prayed for in the statement of claim are:

> 161.1 A declaration that the defendant has committed misfeasance in public office;
>
> 162.2 A declaration that the defendant had abused his public office in personally benefitting and/or profiting from his receipt of 1MDB funds.

[13] The declarations prayed for in sub-paras 161.1 and 162.2 are against 'the defendant'. The plaintiff does not expressly plead whether the declarations are claimed against D1 or D2.

LAW

Law on striking out

[14] This court is empowered under the O 18 r 19(1) of the ROC and under its inherent jurisdiction to strike-out the plaintiff's action against the defendants where it is plain and obvious that the plaintiff's claim is unsustainable.

[15] O 18 r 19(1) states as follows:

> 19 Striking out pleadings and endorsements (O 18, r 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

[16] The power to strike out an action is summary in nature. It is a drastic power which should be used with extreme caution and only in plain and obvious cases. Lord Diplock in delivering the decision of Privy Council in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1; [1975] 1 LNS 133 said that:

> The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution.

[17] The Federal Court in *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347; [1985] 1 CLJ 235; [1985] CLJ Rep 45 quoted with approval the statement made by Lord Diplock in *Tractors Malaysia Bhd* and Lord Herschell in *Lawrance v Lord Norreys* (1890) 15 App Cas 210 where George Seah FCJ said:

> It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.

[18] The locus classicus of the legal principles for striking out is the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 2 AMR 1969; [1993] 4 CLJ 7. Mohamed Dzaiddin SCJ in delivering the decision of the Supreme Court held that:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled. *It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in Hubbuck v Wilkinson* [1899] 1 QB 86, *p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'* (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). ... The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (Emphasis added.)

[19] These principles for striking out were restated by the Federal Court in of *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 1 CLJ 1, where the Federal Court held:

> [26] The tests for striking out application under O 18 r 19 of the ROC, as adopted

by the Supreme Court in *Bandar Builder* are, inter alia, as follows:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

(b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it *'obviously unsustainable'* (Emphasis added.);

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence; and

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

Law on tort of misfeasance in public office

[20] What is the tort of misfeasance in public office? It is a tort that can be traced back to 17th century England in the case of *Turner v Sterling* (1671) 2 Vent 24; 86 ER 287. The tort was recognised in several 18th and 19th century English cases but at the beginning of the 20th century, the English Court of Appeal in *Davis v Bromley Corpn* [1908] 1 KB 170 denied the existence of the tort. The Privy Council, however, in *Dunlop v Woollahra Municipal Council* [1981] 1 All ER 1202 at p 1210; [1982] AC 158 at p 172, described the tort of misfeasance in public office as a 'well-established' tort.

[21] The ingredients of misfeasance in public office as a tort was comprehensively reviewed by the House of Lords in the case of *Three Rivers District Council and others v Bank of England* [2000] 3 All ER 1. In delivering the judgment of the House of Lords *Three Rivers DC v Bank of England,* Lord Steyn considered the place of misfeasance in public office against the general scheme of the law of tort. He observed that:

> The tort of misfeasance in public office is an exception to 'the general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant, and that, if conduct is lawful apart from motive, a bad motive will make him liable' (see *Winfield and Jolowicz on Tort* (15th Ed 1998) p 55, *Bradford Corp v Pickles* [1895] AC 587; [1985–9] All ER Rep 894, *Allen v Flood* [1898] AC 1; [1895–9] All ER Rep 52). *The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes* (see *Jones v Swansea City Council* [1989] 3 All ER 162 at p 186; [1990] 1 WLR 54 at p 85, per Nourse LJ, a decision reverse on the facts but not on the law by the House of Lords: [1990] 3 All ER 737 at p 741; [1990] 1 WLR 1453 at p 1458). The tort bears some resemblance to the crime of misconduct

in public office (see *R v Bowden* [1995] 4 All ER 505; [1996] 1 WLR 98). (Emphasis added.)

[22] In order to understand the reasoning of the House of Lords and the place of the tort of misfeasance in public office against the general scheme of the law of tort, it is necessary to give a brief account of the background of the *Three Rivers District Council* case. The case arose out of the collapse of the Bank of Credit and Commerce International AS ('BCCI') in 1991. BCCI's depositors, against whom the bank left huge debts, commenced legal proceedings against the Bank of England in *Three Rivers District Council v Bank of England* in 1996. The claimants founded their claim on the tort of misfeasance in public office because they were not able to base their claim on the tort of negligence. They alleged that between 1980 and 1991, the Bank of England acted in a knowingly unlawful manner in its supervisory regulation of the activities of BCCI in the United Kingdom. The decision of the House of Lords was an appeal against the decision of Clarke J (as he then was) in *Three Rivers District Council and others v Bank of England (No 3)* [1996] 3 All ER 558, to strike out the depositors' statement of claim on the grounds that it disclosed no reasonable cause of action. Clarke J was called upon to decide at the High Court, as a preliminary ruling, two issues of law that went to the very heart of the depositors' claim, namely: (1) whether the Bank of England could be liable to the depositors for the tort of misfeasance in public office; and (2) whether the depositors' losses were capable of being caused in law by the Bank's omissions. He held that the tort of misfeasance in public office required the deliberate and dishonest wrongful abuse of the powers given to a public officer. The tort could be established where (a) a public officer performed or omitted to perform an act with the object of injuring the plaintiff, and (b) where he performed an act which he both knew to be beyond his power and one that would injure the plaintiff.

[23] It was Clarke J's definition of the tort of misfeasance in public office which was considered by the Court of Appeal and the House of Lords. The definition was endorsed by the House of Lords with some modifications.

[24] The House of Lords held that the tort of misfeasance in public office has two forms:

(a) first form: targeted malice by a public officer where a public officer exercised his power for an improper purpose with the specific intention of injuring the plaintiff; and

(b) second form: a public officer acted knowingly that he has no power to do the act complained of and that the act would probably injure the plaintiff.

[25] Lord Steyn said of the second form of the tort:

> *The basis for the action lies in the defendant taking a decision in the knowledge that it is an excess of the powers granted to him and that it is likely to cause damage to individual or individuals.* It is not every act beyond the powers vesting in a public officer which will ground the tort. The alternative form of liability requires an element of bad faith ([2000] 3 All ER 1 at p 9c). (Emphasis added.)

[26] The second for the tort requires an element of bad faith, which includes knowledge or reckless indifference on the part of the public officer. Lord Steyn held that recklessness to be a sufficient state of mind to ground the tort. He pointed out that the Australian High Court and the Court of Appeal of New Zealand in the cases of *Northern Territory of Australia and others v Arthur John Mengel and others* (1995) 185 CLR 307, *Garrett v Attorney-General* [1997] 2 NZLR 332, *Rawlinson v Rice* [1997] 2 NZLR 651 have ruled that recklessness is sufficient. Clarke J in his first instance judgment in *Three Rivers District Council* agreed with the Australian High Court in *Mengel* and held that recklessness was a sufficient state of mind. The Court of Appeal and the House of Lords accepted the correctness of Clarke J's statement of principle. Lord Steyn in agreeing with the inclusion of recklessness said:

> This is an organic development, which fits into the structure of our law governing intentional torts. The policy underlying it is sound: reckless indifference to consequences is as blameworthy as deliberately seeking such consequences. It can therefore be regarded as settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort in its second form ([2000] All ER 1 at p 9f–g).

[27] Accordingly, for a plaintiff to maintain an action on the second form of the tort, the plaintiff must prove that the public officer either knew that his act would probably injure the plaintiff or he recklessly indifferent as to the consequences of his act. Their Lordships also held that a plaintiff must show that he has sufficient legal right to base an action on the second form of the tort. Lord Steyn held:

> *The question is who can sue in respect of an abuse of power by a public officer … What can be said is that, of course, any plaintiff must have a sufficient interest to found a legal standing to sue*. Subject to this qualification, (the) principle does not require the introduction of proximity as a controlling mechanism in this corner of the law. The state of mind required to establish the tort, as already explained, as well as the special rule of remoteness hereafter discussed, keeps the tort within reasonable bounds. There is no reason why such action cannot be brought by a particular class of persons, such as depositors at a bank, even if their precise identities were not known by the Bank ([2000] 3 All ER 1 at p 10 para (4)). (Emphasis added.)

[28] The plaintiffs in *Three Rivers District Council* claimed for financial loss they suffered and recovery for consequential economic losses. The House of

Lords held that the question is when such losses suffered by the plaintiffs are recoverable. They expressly rejected the test of reasonable foreseeability to establish causation as contended by the counsel for the plaintiffs ([2000] 3 All ER 12 a, g–h). Their Lordships held that the applicable test is the test of knowledge ie the defendant knew that his decision would probably damage the plaintiff or a person of a class of which the plaintiff was a member. Lord Steyn held:

> This is legally sound justification for adopting as a starting point that in both forms of the tort the intent required must be directed at the harm complained of, or at least to harm of the type suffered by the plaintiffs. *This results in the rule that a plaintiff must establish not only that the defendant acted in the knowledge that the act was beyond his powers but also in the knowledge that his act would probably injure the plaintiff or person of a class of which the plaintiff is a member.* ([2000] 3 All ER 1 at p 12e).
>
> This justifies the conclusion of the test [of knowledge that the decision would probably damage the plaintiff] adopted by Clarke J represents a satisfactory balance between the two competing policy consideration, namely enlisting tort law to combat executive and administrative abuse of power and not allowing public officers, who must always act for the public good, to be assailed by unmeritorious actions. ([2000] 3 All ER 1 at p 12h). (Emphasis added.)

[29] The House of Lords's decision in *Three Rivers District Council* had been applied by the Malaysian courts in a number of cases, including *Riga Sdn Bhd v Haji Awang Sepian Haji Awang Joini & Ors* [2005] MLJU 668; [2005] 1 LNS 251, *Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors)* [2004] 3 MLJ 301, *Dato' Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail & Ors* [2015] 7 MLJ 763; [2014] 9 CLJ 489 and *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2017] 9 MLJ 1; [2017] 3 AMR 911.

[30] The Federal Court in *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] 3 MLJ 281; [2017] 4 CLJ 676 held that it is clear that the principles of tort of misfeasance in public office laid down by the House of Lords in *Three Rivers District Council* have been accepted and applied by the courts in Malaysia.

ISSUES FOR DETERMINATION

Parties' arguments in broad outline

[31] For purposes of the defendants' striking-out application, learned counsel for the plaintiff submits that the main issue for determination by this court is whether D1 as Prime Minister is a public officer for the purposes of tort of misfeasance in public office.

[32] Learned counsel for D1 disagrees with the plaintiff counsel's contention. He submits that the questions for determination by this court are that there are three elements of misfeasance in public office and whether all these three elements can be established. The three elements submitted by counsel for D1 are:

(a) whether D1 is a public officer;

(b) whether D1's acts fall within first form of the tort ie the targeted malice limb of misfeasance, or the second form of the tort ie the illegality limb of misfeasance; and

(c) whether the plaintiff pleaded relevant and material particulars of his alleged loss resulting directly as result of the misfeasance.

[33] Learned senior federal counsel representing D2 submits that this court should strike out the plaintiff's claim because:

(a) D1 is not a public officer and the plaintiff does not have any locus standi to bring the proceedings against the defendant; and

(b) the plaintiff's claim, which is a public interest litigation, should have been brought by way of a relator action where the attorney general becomes the plaintiff and the plaintiff as the private citizen his relator.

Necessary ingredients for tort of misfeasance in public office

[34] Upon careful reading of the judgments of Clarke J in the High Court, the Court of Appeal and the House of Lords in the *Three Rivers District Council and others v Bank of England (No 3)* case, I find that the ingredients for the tort of misfeasance in public office are more than just whether D1 is a public officer as submitted by learned counsel for the plaintiff or the three elements submitted by learned counsel for D1.

[35] In my view, based on the ingredients of the tort of misfeasance in public office defined by the House of Lords in *Three Rivers District Council and others v Bank of England (No 3)*, for the plaintiff to succeed in his claim against D1 on the tort of misfeasance in public office with respect to the alleged 1MDB related actions, the plaintiff must establish all, and not just some of the ingredients of the tort, which ingredients are as follows:

(a) that the plaintiff has sufficient antecedent legal rights or interest to sue D1 for the alleged misfeasance in public office;

(b) D1 is a public officer;

(c) D1 when committing the 1MDB related actions acted either:

(i) with the specific purpose of injuring the plaintiff (first form of the tort); or

(ii) with the knowledge that his act would probably injure the plaintiff (second form of the tort);

(d) D1's action caused the plaintiff's loss and damage; and

(e) the plaintiff's loss and damage are recoverable.

[36] The applicable test for recoverability of loss and damage caused by misfeasance in public office is the test of knowledge ie the plaintiff must prove that D1 specifically targeted the plaintiff or D1 knew that his decision would probably damage the plaintiff or a person of a class of which the plaintiff is a member. As discussed in para 28 above, the House of Lords expressly rejected the test of reasonable foreseeability and held that the applicable test is the test of knowledge.

Questions before this court

[37] The question before this court, for purposes of the defendants' striking out application, is whether it is plain and obvious that the plaintiff's statement of claim discloses no reasonable cause of action to enable the plaintiff to maintain a suit against the defendants for D1's alleged tort of misfeasance in public office.

[38] What is a cause of action? Salleh Abas LP in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12; [1988] 1 CLJ Rep 63, quoting Lord Diplock in *Letang v Cooper* [1965] 1 QB 232, defined 'cause of action' as follows:

> 'A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view *the factual situation spoken of by Lord Diplock must consist of a statement alleging that first the respondent/plaintiff has a right either at law or by statute and that secondly such right has been affected or (prejudiced) by the appellant/defendant's act.* (Emphasis added.)

[39] The plaintiff must establish prima facie that he has a legal right or interest at law to bring the claim and he must also establish all, and not just some, of the ingredients of misfeasance in public office against D1.

Does the plaintiff have antecedent legal rights or interests to bring this action?

[40] The plaintiff is seeking for declarations:

161.1 ... that the defendant has committed misfeasance in public office;

161.2 ... that the defendant had abused his public office in personally benefitting and/or profiting from his receipt of the 1MDB funds.

[41] The power of this court to grant declaratory decrees is derived from the Specific Relief Act 1950, which s 41 under the chapter 'Declaratory Decrees' state:

> Discretion of court as to declaration of status or right
>
> 41. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[42] In *Government of Malaysia v Lim Kit Siang*, Hashim Yeop Sani SCJ (at p 88) held that:

> Section 41 does not sanction every form of declaration but only a declaration that the plaintiff is entitled to a specific legal character or to any right as to property. Therefore, any person who has 'a right to any legal character' may bring an action against anyone who denies that right. *The prerequisite for such a declaratory action is that the plaintiff must first establish that he qualifies as a person entitled to any legal character or to any right as to any property. The legal character or the right must exist at the time the action is instituted.* (Emphasis added.)

The plaintiff's legal rights qua taxpayer?

[43] The plaintiff pleads that he suffered loss of reputation because as a taxpayer: (a) his tax monies were directly and/or indirectly utilised for the incorporation of 1MDB and were dissipated and/or misappropriated; and (b) his tax monies will be used in the future to clear the guarantees and assurances given by the Government of Malaysia for the 1MDB bonds.

[44] Therefore, the question before this court is whether the plaintiff, as a taxpayer, has any legal right or interest in 1MDB's properties?

[45] 1MDB is a limited liability company incorporated under the Companies Act 1965. All its shares are wholly owned by the Minister of Finance Inc ('MoF'). As a shareholder of a company, the MoF is legally

permitted, subject to the provisions of the Companies Act 1965 and the company's memorandum and articles of association, to subscribe to the shares in 1MDB. Monies used by the MoF to subscribe to the shares of 1MDB does not in itself amount to an unlawful dissipation and/or misappropriation of tax payers' monies.

[46] It is an elementary principle of law that a company is a separate legal entity distinct from its shareholders. This principle was established in the seminal case of *Salomon v A Salomon & Co Ltd* [1897] AC 22, where the House of Lords held that once a company had been legally incorporated, it had to be treated as a distinct legal persona from its shareholders.

[47] This legal principle has been adopted in Malaysia. In *Law Kam Loy and Anor v Boltex Sdn Bhd and Others* [2005] MLJU 225; [2005] 3 CLJ 355, Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal held:

> The source of the confusion in the minds of the plaintiffs when pursuing their claim against the second to the sixth defendants is their oversight of *the fundamental principle that a company is a separate entity distinct from its shareholders. The property owned by a company belongs to it and not to its shareholders.* That proposition was established by the leading case of *Macaura v Northern Assurance Co Ltd & Ors* [1925] AC 619 where Lord Buckmaster said:
>
> > Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the Company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up. (Emphasis added.)

[48] The plaintiff's claim is premised that as a taxpayer he has legal rights and interest in the properties of 1MDB since 1MDB is wholly owned by the MoF. However, based on the fundamental legal principle that a company is a separate entity distinct from its shareholders, the MoF as shareholder of 1MDB does not have any legal or equitable interest to property owned by 1MDB. What the MoF, as a shareholder of 1MDB, is entitled to is a share in the profits of 1MDB while it continues to carry on business and a share in the distribution of its surplus assets when it is wound up.

[49] It follows that as the MoF does not have any legal right or interest over 1MDB's properties, a taxpayer by virtue of being a taxpayer would also not have any legal rights or interests to the properties of 1MDB.

[50] The plaintiff's claim that his taxpayers' monies will be used in the future to honour the various guarantees and assurances given by the government for

A the 1MDB bonds is not supported by his pleadings. The plaintiff did not provide any particulars of the amounts guaranteed nor did he plead that any of these guarantees have been called upon. Furthermore, the House of Lords in *Three Rivers District Council* had expressly stated the applicable test, on whether or not loss and damage caused by the tort is recoverable, is the test of
B knowledge. Their Lordships expressly rejected the test of reasonable foreseeability. Therefore, the plaintiff must establish that D1 when committing the alleged 1MDB related actions not only knew that he acted beyond his powers but also that he knew that his act would cause the Government of Malaysia's guarantees and undertakings for the 1MDB bonds to be called upon
C and that his act would probably injure the plaintiff or a person of a class of which the plaintiff is a member.

[51] For these reasons, I find that the plaintiff by virtue of being a taxpayer
D does not have any legal rights and interest in the properties of 1MDB. It follows from this finding that the plaintiff's claim that he suffered loss of reputation because his taxpayers' monies had been used to incorporate 1MDB does not give him any legal rights or interests to entitle him to a declaration against D1 under the Specific Relief Act 1950. I also find that the plaintiff's claim that he
E suffered a loss of reputation because his taxpayers' monies will be used in the future to honour the various government guarantees and undertakings for the 1MDB bonds as highly speculative and too remote under established legal principles to accord him any legal right or cause of action grounded on the tort of misfeasance in public office.

F

The plaintiff's legal rights in his personal capacity?

[52] The plaintiff pleads that D1's alleged misfeasance in public office had directly or indirectly caused a significant devaluation of the Ringgit Malaysia
G which resulted in the loss of value of the plaintiff's wealth. The plaintiff does not provide any particulars to show how significant is the devaluation and how D1's alleged misfeasance in public office caused this significant devaluation of the Ringgit Malaysia. He also does not plead how much of the value of his
H wealth had been lost as result of the devaluation of the Ringgit Malaysia. The plaintiff pleads that this loss in wealth and the travel ban imposed on him caused him to suffer a loss of reputation.

[53] In essence, from the plain reading of the statement of claim, the plaintiff
I pleads that D1's tort of misfeasance in public office caused him a loss of reputation. However, the plaintiff did not provide any relevant and material particulars in the statement of claim to show that D1 when he committed the alleged 1MDB related actions not only knew that he acted beyond his powers but also that he knew or was reckless that his act would cause the significant

devaluation in the Ringgit Malaysia, that a travel ban will be imposed on the plaintiff and these would cause the plaintiff to lose his reputation.

[54] Moreover, the law is settled with regards to claims for loss of reputation. Claims for loss of reputation lie in an action pursuant to the tort of defamation. The House of Lords in *Spring v Guardian Assurance plc and others* [1994] 3 All ER 129 approved and accepted the principle as stated by Hallet J in *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393 that:

> ... a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action.

[55] Therefore, it is clear from established legal principles that the plaintiff cannot base his claim for loss of reputation on the tort of misfeasance in public office. Such a claim for loss of reputation has to be pursued in an action for defamation.

[56] For the reasons above, based on the plaintiff's pleaded case, this court finds that the plaintiff has not prima facie established that he has antecedent legal rights or interests to bring an action against the defendants for loss of reputation caused by D1's alleged tort of misfeasance in public office in relation to the 1MDB related actions.

Locus Standi for public interest litigation

[57] The investigations by Bank Negara, the Attorney General's Chambers and the US Department of Justice into 1MDB and D1's alleged involvement in the 1MDB related actions have given rise to a lot of public interest in the company and D1's role as Chairman of its Board of Advisors. Learned senior federal counsel for D2 submits that the plaintiff's action against D1 for the 1MDB related actions is a public interest litigation. The oft-quoted case on locus standi for public interest litigation is the decision of the Supreme Court in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12; [1988] 1 CLJ Rep 63, where , who was a Member of Parliament and leader of the opposition brought an action against United Engineers (M) Bhd ('UEM') and the Government of Malaysia in relation to the contract for the construction of the North-South Highway awarded by the Government of Malaysia to UEM.

[58] It is evident from the majority judgment of the Supreme Court in *Government of Malaysia v Lim Kit Siang* that where a private citizen does not locus standi in to bring a case against a public officer or public authority, he should obtain the consent of the attorney general to be a relator action. The attorney general is constitutionally regarded as the guardian of the public

A interest. Therefore, he does not need to show any locus standi to bring an action against a public body or public authority. Salleh Abas LP held:

> In a public law litigation the rule is that the Attorney-General is the guardian of public interest. It is he who will enforce the performance of public duty and the compliance of public law. Thus when he sues he is not required to show locus standi. *On the other hand any other person, however public spirited he may be, will not be able to commence such litigation, unless he has a locus standi, or in the absence of it, he has obtained the aid or consent of the Attorney-General*. If such consent is obtained the suit is called a relator action in which the Attorney-General becomes the plaintiff whilst the private citizen his relator.
>
> *Locus standi is inseparable from, and indeed intertwined with, relator actions because if a private citizen, wishing to complain that a public authority has not legally performed its function or has failed to perform it altogether, has no locus standi, he must obtain the consent of the Attorney-General in order to commence a relator action.* Without locus standi he cannot proceed on his own. In cases where the Attorney-General has given his consent, there is, of course, no problem, because no locus standi needs to be shown since the Attorney-General is constitutionally regarded as the guardian of public right. The difficulty arises where the necessary consent is not obtained before a private citizen launches a suit. In a few cases involving matters of general public interest, which were started by a private citizen, the Attorney-General did intervene in the proceedings either by subsequently giving his consent or even by his personal appearance, thereby dispensing with the requirement of locus standi of the applicant. Yet there are cases in which he made no such intervention at all. In such cases the applicant must show locus standi. (Emphasis added.)

[59] Therefore, as the plaintiff is not able to show that he has any locus standi as a private citizen to bring this action against the defendants, and because of the public interest nature of his action against the defendants, the plaintiff should have commenced his action against the defendants by way of a relator action, whereby the Attorney General becomes the plaintiff and the plaintiff, his relator.

Is D1 a public officer?

[60] The High Court in *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2017] 9 MLJ 1; [2017] 3 AMR 911 held that the Prime Minister of Malaysia is not a public officer based on the definition of 'public office' in the Interpretation Acts 1948 and 1967 ('the IA') read together with the Federal Constitution ('the FC').

[61] The Court of Appeal upheld the High Court's decision in *Tun Mahathir* that the Prime Minister of Malaysia is not a public officer. Accordingly, pursuant to the principle of stare decisis, this court is bound by the Court of Appeal's decision that D1 in his capacity as Prime Minister is not a public officer.

[62] On the question of whether D1 is a public officer by virtue of his position as Finance Minister, the position is similar to that of a Prime Minister. The office of the Prime Minister and Ministers are expressly excluded from the definition of public service.

[63] The relevant definitions under the IA and the FC are as below:

'public office'	means an office in any of the public services (s 3 of the IA).
'public services'	means the armed forces; the judicial and legal service; the general public service of the Federation; the police force; the joint public services mentioned in art 133 of the FC; and the education services (art 132(1) of the FC). 'members of the administration' (art 132(3) of the FC states: 'the public service shall not be taken comprise (a) the office of any member of the administration in the Federation or a State ...'); are excluded from the definition of 'public services'.
'member of the administration'	means in relation to the Federation, a person holding office as Minister, Deputy Minister, Parliamentary Secretary or Political Secretary and, in relation to a State, a person holding a corresponding office in the State or holding office as member (other than an official member) of the Executive Council (art 160(2) of the FC).
'Minister'	means a Minister of the Government of Malaysia (including the Prime Minister and a Deputy Minister).

[64] IMDB is limited company incorporated under the Companies Act 1965. Companies do not come within the definition of 'public office' under the IA. 'Parliament' is defined as 'the Parliament of Malaysia' and 'Houses of Parliament' as 'the Senate and House of Representatives' (s 3 of the IA). Neither the Senate nor the House of Representatives comes within the definition of 'public office' or 'public services' under the IA.

[65] For these reasons, this court finds that D1 is not a public officer pursuant to his capacity as Prime Minister, Minister of Finance, as the Chairman of the Board of Advisors of 1MDB or as a member of Parliament.

What was D1's state of mind when he committed the alleged acts?

[66] The plaintiff's complaint against D1 relates, in essence, to the 1MDB related actions listed in s 158 of his Statement of Claim. The plaintiff claims that, among others, is by virtue of Article 117 of 1MDB's memorandum and articles of association, D1 would have had the power to commit the 1MDB related actions.

A **[67]** Based on the definition of the tort of misfeasance in public office stipulated by the House of Lords in the *Three Rivers District Council* case, it is not sufficient for the plaintiff to prove that D1 had committed all the 1MDB related actions. The plaintiff must also prove that these actions were unlawful. Once he has proven that D1's actions were unlawful, the plaintiff must prove
B D1's state of mind. The plaintiff must prove either: (i) that D1 committed the 1MDB related actions with the specific purpose of targeting the plaintiff (*first form of the tort*); or (ii) that D1 when he committed all the alleged 1MDB related actions: (a) knew that they were unlawful: and (b) knew that his actions would probably cause the plaintiff the loss of reputation he pleads to have
C suffered (*second form of the tort*).

[68] The plaintiff did not plead that D1 specifically intended to injure the plaintiff when he allegedly committed the 1MDB related actions. Accordingly,
D I find that the plaintiff's action against D1 is not one of targeted malice ie the first form of the tort. For the plaintiff's action on misfeasance in public office to be sustainable, it must be in the second form of the tort.

[69] The basis for an action on the second form of the tort lies in D1 taking
E a decision to commit the 1MDB related actions knowing that it is in excess of the powers granted to him as a public official and that he knows or was recklessly indifferent that his actions would probably cause damage to the plaintiff.

F **[70]** Therefore, for the second form of the tort, the plaintiff must demonstrate that D1 when he allegedly committed the 1MDB related actions, knew that it was in excess of his powers and he knew that his act would probably injure the plaintiff or he was recklessly indifferent as to the consequences of his action. No particulars relating to D1's state of mind are
G pleaded in the statement of claim. Without such particulars, this court is not persuaded that the plaintiff can establish on a balance of probabilities that D1 when he allegedly committed the 1MDB related actions knew that the actions were in excess of his powers and he knew that the actions would probably cause the loss of reputation claimed by the plaintiff or he was reckless as to the
H consequence of his actions.

Did D1's acts cause the loss and damage claimed by the plaintiff and are the damages recoverable?

I **[71]** Causation and remoteness of damages are essential elements of the plaintiff's cause of action. Based on the dicta of the House of Lords in *Three Rivers District Council*, as discussed in para 28 above, the relevant test for determining whether loss suffered by the plaintiff is recoverable is the test of knowledge, namely that D1 knew that his decision to commit the 1MDB

related actions would probably cause the loss of reputation claimed by the plaintiff. A

[72] Without providing any particulars on the state of D1's mind at the time of committing the 1MDB related actions, the plaintiff would not be able to satisfy the test of knowledge that D1 knew that his decision would probably cause the loss of reputation to the plaintiff or a person of a class of which the plaintiff is a member. Furthermore, unlike a claim for consequential economic loss by the BCCI depositors in *Three Rivers District Council*, the plaintiff's claim for loss of reputation is personal to him and loss of reputation is not a recognised cause of action under the tort of misfeasance in public office. B C

[73] Accordingly, this court finds that the plaintiff is not able to demonstrate based on his pleadings the rest of the essential elements of the tort of misfeasance in public office, namely that D1's actions caused the plaintiff's loss of reputation and that the loss suffered is recoverable. D

CONCLUSION

[74] The House of Lords in *Three Rivers District Council* had set a high bar for establishing a cause of action in the tort of misfeasance in public office. Professor Adrian Zuckerman of Oxford University (Professor of Civil Procedure at the University of Oxford and Editor of the *Civil Justice Quarterly*) in his editor's note to the *Civil Justice Quarterly,* Vol 25, July 2016 entitled 'A Colossal Wreck — the BCCI-Three Rivers Litigation' reviewed the House of Lords decision on the ingredients of the tort of misfeasance in public office and commented that: E F

> ... the definition of misfeasance in public office set a very high, if not impossible, hurdle for the claimants to surmount (Civil Journal Quarterly, Vol 25, July © Sweet & Maxwell 2006 at p 289). G
>
> ...
>
> Essentially the bar (set by the House of Lords) to proving misfeasance in public office remained as high as (if not higher than) that which was pronounced by the courts below. H
>
> ...
>
> The claimant's action was thus spared summary dismissal (the House of Lords allowed the BCCI depositors appeal against Clarke J's decision in striking out their claim against the Bank of England), but they were left with a tall mountain to surmount, for they now needed to prove, in effect, a conspiracy on the part of the Bank of England officers to act unlawfully in order to harm them, or with the full knowledge that their unlawful actions would harm depositors (Civil Journal Quarterly). I

[75] To succeed in an action for the tort of misfeasance in public office, a plaintiff must establish every single ingredient of the tort against the defendant. In the *Three Rivers District Council* case, the BBCI depositors established all bar one of the ingredients of the tort of misfeasance in public office against the Bank England. Professor Zuckerman observed that after 12 years and 256 days of trial, the depositors had to abandon their case against the Bank of England because of the lack of evidential support to prove a conspiracy by the Bank of England officers to act unlawfully in order to harm the depositors, or with the full knowledge that their unlawful actions would harm the depositors (Civil Journal Quarterly).

[76] In this instant case, this court finds that the plaintiff has failed to establish in his pleadings any of the ingredients of the tort. Among the key ingredients the plaintiff must establish is locus standi, which for the reasons discussed above, this court finds he is not able to establish. The other key ingredient that the plaintiff has to prove is D1's state of mind when committing the alleged 1MDB related actions. Unlike other torts where the test of reasonable foreseeability is sufficient, the applicable test for the tort of misfeasance in public office is the test of knowledge that the action would probably damage the plaintiff. The plaintiff must prove on a balance of probabilities that D1 committed the alleged 1MDB related actions and that when D1 committed the acts: (i) he knew that the acts were unlawful; (ii) he knew or was recklessly indifferent that the acts would cause: (a) the plaintiff's taxpayers' monies to be used in the future to honour the government's guarantees and undertakings for the 1MDB bonds; (b) the significant devaluation of the Ringgit Malaysia; and (c) the travel ban imposed on the plaintiff; and (iii) the acts would cause the plaintiff to suffer a loss of reputation because of (ii)(a), (b) and (c).

[77] Much has been said in the press and social media following the High Court's finding in *Tun Dr Mahathir Mohamad* that D1 as Prime Minister is not a public officer, which finding was affirmed by the Court of Appeal. However, as discussed in this judgment, the fact that D1 is a public officer is not the sole determinant of whether the plaintiff has a reasonable cause of action against D1 for the tort of misfeasance in public office. Therefore, in the event the Federal Court reverses the decisions of the High Court and the Court of Appeal in *Tun Dr Mahathir Mohamad* and finds that D1 as Prime Minister is a public officer, the plaintiff would still have to establish all the other ingredients of the tort of misfeasance in public office in order to have a reasonable cause of action in the tort against D1.

[78] For all the reasons above, this court finds that the plaintiff has not been able to establish any of the ingredients required to found a prima facie case of tort of misfeasance in public office against D1. In my judgment, the plaintiff's

failure to establish these necessary ingredients renders his cause of action for the tort of misfeasance in public office against D1 obviously unsustainable.

[79] Accordingly, D1's application to strike out the plaintiff's writ and statement of claim is allowed.

[80] As the claim against D2 for vicarious liability is premised on the plaintiff succeeding in his claim against D1, the action against D2 becomes unsustainable upon the striking out of the writ and statement of claim against D1. Accordingly, D2's application is allowed.

[81] The plaintiff's action against D1 and D2 is hereby struck out with cost of RM5,000 each to D1 and D2 subject to the payment of the allocator fee.

Defendants' claims allowed; plaintiff's action against defendants struck out with costs of RM5,000 each to first and second defendants subject to allocator.

Reported by Dzulqarnain Ab Fatar